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Supreme Court, U.S.
FILED

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In the

Supreme Court of the United States

CECIL R. ARNOLD,

Petitioner,

v.

RAYONIER, INC.,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

1. Is it error for the District Court and the Court of Appeals (11th Circuit) to hold as a matter of law that it is not a violation of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* ("ADEA") for the Defendant Rayonier to refuse to consider a highly qualified individual for employment because he was not in the limited pool of individuals they would allow to apply for vacant positions although the Plaintiff was an individual who was intended to be protected the by Age Discrimination in Employment Act (51 years of age)?

2. Is it error for the District Court and the Court of Appeals (11th Circuit) to hold that the Defendant Rayonier was entitled to a judgment as a matter of law in Plaintiff's Age Discrimination in Employment Act case because the Court held that Arnold could not prove his prima facie case because Rayonier failed to fill the job with a younger applicant but left the job vacant? Is Plaintiff required to prove that a younger individual was hired as an essential element of his case or can he proceed where his application is rejected and the job is still vacant? Plaintiff Arnold was 51 years of age, highly qualified for the position, suffered adverse action because Defendant Rayonier refused to accept his application or consider him for employment. (See McDonnell-Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). Also see Reeves v. Sanderson Plumbing Products, Inc., 530 U. S. 133, 120 S. Ct. 2097, 2109, 147

L.Ed.2d 105 (2000), which approved the elements in McDonnell-Douglas v. Green, Supra,

3. The Age Discrimination in Employment Act is an Act to prevent the Employer from rejecting the applicant because of his protected age. Is the employer prohibited from: limiting, segregating, or classifying his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age? (See 29 U.S.C. §623 (a)(2)).

PARTIES TO THE PROCEEDING

Petitioner (Plaintiff): Cecil R. Arnold
Respondent (Defendant): Rayonier, Inc.
Honorable Anthony A. Alaimo, Judge
United States District Court

Guy O. Farmer, II, Attorney for Defendant

Forestal Rayonier Chile, Ltd.

The Honorable James E. Graham, United States Magistrate Judge for the Southern District of Georgia

Holland and Knight, LLP, Attorney for Defendant

Joseph C. Kitchings, Attorney for Plaintiff

New Zealand Timberlands Limited

Richard D. Phillips, Attorney for Plaintiff

Phillips and Kitchings, Attorney for Plaintiff

PPP Asset Co. Limited

RayAd, Inc.

Rayland Company, Inc.

Rayonier Canada Ltd.

Rayonier China Limited

Rayonier CNI Limited

Rayonier De Mexico, S. A. de C.F.

Rayonier Far East Ltd.

Rayonier Financial Services (U.K.) Ltd.

Rayonier Foreign Sales Corporation

Rayonier Forest Management, Inc.

Rayonier Forest Resources Company

Rayonier, Inc.

Rayonier, Industries, Ltd.

Rayonier International Financial Services Limited

Rayonier New Zealand Limited

Rayonier New Zealand Services Company

Rayonier Northland Limited

Rayonier NZ Holdings Limited

Rayonier NZ Management Limited

Rayonier NZ MDF Ltd.

Rayonier Products and Financial Services Company

Rayonier Pulp Distribution Corp.

Rayonier Singapore Limited

Rayonier Timberlands Holding Corporation

REMI Environmental, Inc.

RLA Trading Corporation

Southern Wood Piedmont Company

Taiga Ltd.

Taylor, Odachowski & Sperry, LLC, Law Firm of
Local Counsel for Defendant/Appellee
The Rayonier Foundation

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IN THE
SUPREME COURT OF THE UNITED STATES

CECIL R. ARNOLD,

Petitioner,

vs.

RAYONIER, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Cecil R. Arnold, Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

This is a Complaint alleging age discrimination and retaliation by Rayonier, Inc. (Rayonier) against Cecil R. Arnold. (Arnold). The action began when Arnold filed his Complaint against Rayonier in the United States District Court, Southern District of Georgia, Brunswick Division alleging age discrimination against Arnold (51 years of age) and for retaliation because of a complaint for age discrimination based upon his termination in September, 1996 from his foreman position (salaried) after over 27 years of service with Rayonier. Rayonier responded to the

Complaint and after discovery moved for summary judgment upon the grounds Arnold could not make out a prima facie case because the last position denied Arnold was not filled but remained vacant.

Arnold responded and showed that Rayonier had refused to accept his applications for employment and refused to consider him for employment in any one of five vacant positions for which he was qualified from December 21, 1999 to February 20, 2001, with the last position of Machine Finishing Supervisor being left open after Rayonier rejected all applicants they considered. The District Court granted Rayonier's summary judgment upon the ground that since Rayonier did not fill the last vacancy with a younger applicant Arnold could not make out a prima facie case of age discrimination. Arnold pointed out that under McDonnell-Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973); Reeves v. Sanderson Plumbing Products, Inc., 530 U. S. 133, 120 S. Ct. 2097, 2109, 147 L.Ed.2d 105 (2000) which approved the elements in McDonnell-Douglas v. Green, supra, and O'Connor v. Consolidated Coin Caters Corporation, 116 S.Ct. 1307, 517 U.S. 308, 134 L.Ed.2d 433, that illogical variations were not a part of a prima facie case. Arnold appealed to the Eleventh Circuit Court of Appeals, which affirmed the judgment of the District Court. The Court of Appeals held, as did the District Court, that Arnold failed to establish "a prima facie case of age discrimination because the undisputed evidence showed that Rayonier never permanently filled the 2001 position." The Court of Appeals opinion further held "Rayonier proffered a legitimate non-discriminatory reason for not hiring him – namely, that it was only considering current Rayonier employees for the 2001 position -." Arnold filed his Petition for Panel Rehearing and Rehearing En Banc on February 17, 2003, and the

Court of Appeals denied the Petition for Rehearing or Rehearing En Banc on April 2, 2003.

Citations of the official and unofficial reports of the opinions and orders entered in the case.

The opinions and orders are not published. See the Order of the District Court dated June 26, 2002 granting Defendant's Motion for Summary Judgment (P.6a–7a), the Judgment of the Eleventh Circuit Court of Appeals dated January 28, 2003 (P.1a–5a). (Arnold v. Rayonier, Inc., 61 Fed. Appx. 671 (Table), 2003 WL 346870) and the Order from the Eleventh Circuit Court of Appeals dated April 2, 2003 denying Arnold's Petition for Rehearing and Petition for Rehearing En Banc (P.8a) (Arnold v. Rayonier, Inc., 192 F.3d 132 (Table)).

BASIS FOR JURISDICTION

(i) The Judgment of the District Court was entered and filed on the 26th day of June, 2002.

The opinion of the Eleventh Circuit Court of Appeals was entered and filed on the 28th day of January, 2003.

This Petition is not filed under this Court's Rule 11.

(ii) The opinion of the Eleventh Circuit denying Petitioner's Petition for Rehearing and Rehearing En Banc was entered and filed on the 2nd day of April, 2003. There has not been any order granting an

extension of time to file this Petition for Writ of Certiorari.

(iii) Not Applicable.

(iv) 28 U.S.C. §1254(1)

(v) Not Applicable.

The jurisdiction of this Court is invoked under 28 USC §1254 (1).

THE RELEVANT STATUTES INVOLVED

1. The Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*

"§621. Congressional statement of findings and purpose.

(a) The Congress hereby finds and declares that –

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice,

and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

2. 28 U.S.C. §631 (a) – which sets the age limits for application of this statute.

"§631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age."

3. 28 U.S.C. §623 (a)(1) and (2) – Unlawful Employer Practices.

"§623. Prohibition of age discrimination.

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive <u>any individual</u> of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age" (Emphasis added).

STATEMENT OF THE CASE

This is a Petition under 28 U.S.C. §1254(1) for a Writ of Certiorari to correct the erroneous rules of law pronounced in Arnold's Age Discrimination in Employment Action, 29 U.S.C. §621, *et seq.* The jurisdiction in the District Court was based on the fact that this action was brought based upon a Federal Statue, to wit: 29 U.S.C. §621.

This is an appeal from the Judgment of the District Court granting Defendant's Motion for Summary Judgment on Arnold's ADEA case. (R-3-29 and R-3-31). Plaintiff is Cecil Ray Arnold (Arnold). The Defendant is Rayonier, Inc. (Rayonier). The evidence shows that Arnold worked for Rayonier for over 27 years and over 20 years he was a foreman in the finishing room. During that time he supervised up to 30 employees. (R-2-22 – Affidavit of Cecil Ray Arnold, Exhibit 1) In addition, he was familiar with the warehouse operation and from time to time handled foreman duties there, and was also familiar with the machine room, which adjoined the finishing room. (R-2-22 – Affidavit of Cecil Ray Arnold, Exhibit 1).

Thereafter, on December 21, 1999, Arnold received a job posting showing that Rayonier had a vacant supervisory position described as Area Manager, Warehouse in the Machines, Finishing, Warehouse. Because of his past employment, training and experience at Rayonier, Arnold was imminently qualified for this position. (R-2-22, Affidavit of Cecil Ray Arnold, Exhibit 1).

Arnold secured an application form and attempted to apply for this position. Rayonier then advised Arnold that they would not accept his application nor consider him for employment since he

was not a current employee of Rayonier. (R-2-22, Affidavit of Cecil Ray Arnold, Exhibit 1) and (Deposition of Jennifer Johnson, page 13). At that time, Mr. Tom Norton (Norton) was the Director of Human Resources. The Department of Human Resources at Rayonier had an Employee Referral Program known as H.R. Practice 4.0 which would pay any Rayonier employee $500.00 as incentive for recommending a qualified person not employed by Rayonier for employment when the person was hired for the position. (R-2-22, Exhibit 6 – Deposition of Tom Norton, Exhibits 1-6 attached to the end of the deposition). This incentive was used to locate qualified personnel from outside the employees of Rayonier. The job vacancy announcements posted and informally distributed each had this reference to H.R. Practice 4.0 promising to pay any Rayonier employee $500.00 for recommending a qualified candidate to Rayonier to fill the vacancy if he or she was ultimately hired. The announcement said to contact Jennifer Johnson (Johnson) as the Human Resources contact regarding this job vacancy. (R-2-22, Exhibit 6, Deposition of Tom Norton, Exhibits 1-6 attached to the end of the deposition).

Although this job vacancy announcement had no limitations to "in house" employees and contained the reference to H. R. Practice 4.0 which refers exclusively to non-employed candidates, Rayonier refused to allow Arnold to apply for the vacancy and refused to consider Arnold for employment. (R-2-22, Affidavit of Cecil Ray Arnold, Exhibit 1). This vacancy was filled by Bruce Woodard, a significantly younger individual. (R-2-22, Affidavit of Cecil Ray Arnold, Exhibit 1 and R-2-22, Affidavit of Julian Jackson, Exhibit 2). Norton acknowledged that Arnold appeared to be qualified for the position and he was not passed over because of his

lack of qualification for the job. (R-2-22, Deposition of Tom Norton, pages 16 and 17, Exhibit 6).

On August 8, 2000 Rayonier posted a job vacancy announcement for a Finishing Production Planner. Arnold received a copy of the job vacancy announcement and he was well qualified for this position since it dealt with the needs of the machines/finishing area where he worked for over 20 years. When Arnold contacted Johnson at the Human Resources Department she again advised Arnold that he was not eligible and they would not consider him for employment. Rayonier then filled the vacancy with Earl Dent who was less qualified than Arnold and 15 years younger. (Affidavits of Cecil Ray Arnold, Exhibit 1, and Julian Jackson, Exhibit 2). Rayonier would not consider Arnold's qualifications for the job and would not allow Arnold to submit an application for the position.

On October 30, 2000, the Area Manager Warehouse was again vacant and the job vacancy announcement was posted. Arnold again contacted Johnson and was advised he was not eligible to apply and Rayonier refused to consider his application for employment.

On January 31, 2001, Rayonier posted a job vacancy announcement for the position of Machines/Finishing Shift Supervisor. This job was virtually identical to the job held by Arnold for over 20 years as Shift Supervisor over the Finishing Department. (R-2-22, Deposition of Cecil Ray Arnold, Exhibit 1 and Deposition of Julian Jackson, Exhibit 2). Arnold again contacted Johnson who advised that he was not eligible to apply for this position. Since the announcement had the H. R. Practice 4.0 language and there was no restriction on the announcement to present employees,

Arnold had one copy of his application hand delivered to Johnson by Gleason Copeland, a long time employee of Rayonier, together with a recommendation in compliance with H. R. Practice 4.0 and Arnold also mailed one copy by certified mail. (R-2-22, Affidavit of Cecil Ray Arnold, Exhibit 1, R-2-22, Affidavit of Gleason Copeland, Exhibit 3)

Norton, the H. R. Director, acknowledged he was aware of Arnold's applications and requests for consideration for employment and admitted that Rayonier would not accept Arnold's application for employment since he was not a current Rayonier employee. (R-2-22, Deposition of Tom Norton, Exhibit 6, pages 15-17) On the Machines/Finishing Shift Supervisor position, Rayonier interviewed several "in house" employees but was not satisfied with any of them; therefore, Rayonier did not fill the position. Rayonier still, however, refused to consider Arnold's application for employment in this position. While Rayonier refused to consider Arnold for employment they were continuing to search for a qualified candidate for the vacancy and the position has been vacant since January 31, 2001. (R-2-22, Exhibit 7, Scott Deposition, page 50)

Arnold shows that this shows a pattern of illegal discrimination from December 21, 1999 to the present. The Court should consider this as a continuing act of discrimination and consider his rejection for every position in the pattern to show the pattern of discrimination.

The District Court and the Eleventh Circuit Court of Appeals limited the consideration of discrimination to the last position, to-wit: Machines/Finishing Shift Supervisor which was posted on January 31, 2001 and

refused to consider the prior acts of discrimination. (R-3-29 and 31). In addition, the District Court and the Court of Appeals refused to consider the discrimination against Arnold for the position of Machines/Finishing Shift Supervisor and held that Arnold could not prove a prima facie case since he could not prove that the position which was vacant was filled by a significantly younger individual since it is still open. (R-2-22, Affidavit of Cecil Ray Arnold) (P.6a-7a District Court Order)(P.1a–5a Eleventh Circuit Court of Appeals Order). The evidence shows that significantly younger individuals are being trained for the position by "setting up" other employees.

The evidence shows that the proffered reason by Rayonier that they were limiting their consideration of eligible candidates to fill the job vacancies announced to current employees was false and pretextural since Arnold and Julian Jackson (Jackson), the Union President listed nine salaried employees who were hired from outside the current employment pool during the same time Rayonier was refusing to accept or consider Arnold's application for employment into any salaried position. (R-2-22-Exhibits 1 and 2 – Affidavits of Arnold and Jackson).

In addition, the evidence showed that the very announcement posted showed it was not limited to a certain class of people and it offered to reward employees for recommending non-employed candidates to Rayonier for the position posted. (R-2-22, Deposition of Tom Norton, Exhibit 6, pages 15-17).

The actions of Rayonier through contact with Jennifer Johnson established a pattern of rejection of Arnold's applications and a refusal to consider him for any position advertised. (R-2-22, Exhibit 1, Affidavit of

Cecil Ray Arnold) (R-2-22, Johnson Deposition, Exhibit 5, pages 9-11) (R-22-22 Exhibit 6, Deposition of Tom Norton, page 12) (R-2-22, Exhibit 7, Scott Deposition, page 50).

Plaintiff shows that the job vacancy announcements were informally distributed by informal postings at the Jesup Mill for all employees to see and in addition the news of the vacancies announced by the Mill was distributed by word of mouth. On the nine (9) salaried positions filled from outside employees during this time, Rayonier would not consider Arnold for employment.

Norton admitted in his deposition that their practice was not in keeping with their job vacancy announcements. (R-2-22 Exhibit 6, Deposition of Tom Norton, page 12).

Jennifer Johnson, who was the contact person in the Human Resources Department, was familiar with Arnold from previous litigation over the 1996 R.I.F. and knew Arnold's age, to-wit: 51. As a long time Human Resources Services Manager Jennifer Johnson was familiar with the H. R. Practice 4.0 that was on the job postings and the awards for referrals. (R-2-22, Johnson Deposition, Exhibit 5, pages 9-11).

The District Court and the 11th Circuit Court of Appeals held that Arnold could not make out a prima facie case of discrimination because the evidence showed, without dispute, that the January 2001 position was not filled by a younger individual since the position was still vacant and that proof that Rayonier filled the position with a younger individual was an essential element of Arnold's A.D.E.A. claim.

The Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* is a remedial statute to protect citizens who have traditionally been the victims of age discrimination. These rights should not be abrogated by any Panel and certainly not by an erroneous ruling contrary to the framework established by this Court. Under McDonnell-Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) and Reeves v. Sanderson Plumbing Products, Inc., 530 U. S. 133, 120 S. Ct. 2097, 2109, 147 L.Ed.2d 105 (2000) a prima facie showing does not require that Arnold prove that Rayonier filled the position with a younger applicant as held by the District Court and the Eleventh Circuit Court of Appeals. McDonnell-Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) 411 U. S. 792, 93 S.Ct recognizes as the fourth element that the position remained unfilled. Reeves v. Sanderson Plumbing Products, Inc., 530 U. S. 133, 120 S. Ct. 2097, 2109, 147 L.Ed.2d 105 (2000) approved the elements listed in McDonnell-Douglas v. Green, Supra. That is exactly what Arnold proved in this case. The rules should not be changed without notice. Reeves v. Sanderson Plumbing Products, Inc., 530 U. S. 133, 120 S. Ct. 2097, 2109, 147 L.Ed.2d 105 (2000) shows further that even the ultimate fact of discrimination may be inferred from the false proffered reason by Defendant. This rule also controls the case and was ignored by the Panel. The application of the rules handed down by the Supreme Court should be followed and uniform and the Court should correct this error. The various Courts of Appeals appear to have corrupted the ruling over the years as to their elements of a prima facie case and have engrafted onto the elements holding that the position must be filled by an individual outside the protected class or that the position must be filled not still vacant contrary to McDonnell-Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) and Reeves v. Sanderson

Plumbing Products, Inc., 530 U. S. 133, 120 S. Ct. 2097, 2109, 147 L.Ed.2d 105 (2000). (See also O'Connor v. Consolidated Coin Caters Corporation, 116 S.Ct. 1307, 517 U.S. 308, 134 L.Ed 2d. 433).

The District Court did not consider the continuous refusal of Rayonier to accept Arnold's applications or consider him for any of the salary positions that came up from December 21, 1999 to the time of the filing of this Complaint as a continuing act of discrimination or retaliation.

The District Court then granted Defendant's Motion for Summary Judgment upon the grounds Arnold could not establish a prima facie case since he could not prove that Rayonier hired a significantly younger person in the position.

Arnold shows that the judgment granting Rayonier's Motion for Summary Judgment and the erroneous opinion of the Eleventh Circuit Court of Appeals should be reversed and remanded to correct these errors.

REASONS FOR GRANTING WRIT

As set out in the Age Discrimination in Employment Act, 29 USC 623, et. seq., Congress recognized the problems created by age discrimination and the devastating toll on the individual and society. It has long been apparent that the Age Discrimination in Employment Act, 29 USC §621, et seq., is not a favorite of the District Courts or the Circuit Courts of Appeals. Most of the ADEA cases are decided for the employer on motion for summary judgment and the Circuit Courts of Appeal summarily affirm the District Court.

The decisions of this Court interpreting and setting the parameters to establish a prima facie case are quickly eroded by the lower Courts and again and again the Applicants for employment have to come back to this Court to direct the Circuit Courts of Appeals. The leading case, which sets the framework to follow in Title VII cases and age discrimination cases is McDonnell–Douglas v. Green, Supra. The four part frame work to establish a prima facie case as set out by McDonnell-Douglas v. Green, Supra is (i) that he belongs to a racial minority (protected group); (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

We respectfully submit that under the McDonnell-Douglas v. Green, Supra framework, Arnold made out a prima facie case when he presented evidence that (1) he belonged to the protected class, to-wit: 40 to 70 years of age; (51); (2) that he applied for and was qualified for a job for which the employer was seeking applications; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications. Under McDonnell-Douglas v. Green, Supra actual employment of a younger person is not an element of the prima facie case.

Most cases arise under McDonnell-Douglas v. Green, 411 U. S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973), where the Plaintiff must show by circumstantial evidence that he is the victim of age discrimination.

Direct evidence of age discrimination is a rare item since the captains of industry are not stupid.

In this case the District Court and the Court of Appeals (11th) appear to be again departing from the rulings of this Court in this case and fail to recognize the elements of a prima facie case under McDonnell-Douglas vs. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973).

The first question requires us to examine the intent of Congress when they passed the Age Discrimination in Employment Act, 29 USC §621, et seq. and what evil were they correcting? 29 USC §621 (a) provides:

1. The Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*

> "§621. Congressional statement of findings and purpose.
>
> (b) The Congress hereby finds and declares that –
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice,

and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

The Act is passed to protect individuals aged 40 and above. 29 USC §621, et. seq. In this case, Rayonier showed a pattern of discrimination by refusing to accept Arnold's application for any of the vacant salaried position and they refused to consider him for employment into any of the positions. Rayonier contends they have a right to avoid considering Arnold for employment by limiting the pool of individuals they will consider to their current employees.

We point out that Congress provided "It shall be unlawful for an employer

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age" (Emphasis added).

The Act protects "any individual". It does not appear that Congress intended to allow an employer to limit the pool of applicants they consider for employment to a certain group and thereby deny the protection against age discrimination to the balance of the public.

This Court pointed out that "the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the Plaintiff is a far more reliable indication of age discrimination than is the fact that the Plaintiff was replaced by someone outside the protected class." O'Connor v. Consolidated Coin Caterers Corp. 116 S.Ct. 1307, 517 U.S. 308, 134 L.Ed. 2d 433.

It appears that O'Connor holds that it is not a fact of the McDonnell-Douglas v. Green, Supra elements of a prima facie case that the successful candidate for employment be outside the protected class and such illogical standard established by the District Court and

Court of Appeals was reversed because it departed from the standards established by this Court.

We submit that the standard adopted by the District Court and the Eleventh Circuit Court of Appeals is even more illogical, to-wit, ADEA discrimination is not shown because Arnold does not belong to the pool from which Rayonier would consider applications. The establishment of a private pool of individuals from whom Rayonier will accept applications has nothing to do with whether Rayonier is discriminating against Arnold because of his age. This standard should not be allowed to stand any more than the illogical standard in O'Connor v. Consolidated Caterers Corp., Supra.

29 USC §621 shows that Congress recognized that it was necessary to pass remedial legislation to protect all individuals in the work force from age discrimination. Why should Rayonier not be allowed to limit the pool of prospective employees to a small group such as their current employees?

1. The Age Discrimination in Employment Act was passed to protect all citizens and to allow them to be judged on their ability not arbitrary age limits. By limiting the pool of applicants, Rayonier denies most citizens the protection of this remedial act.

2. Employees of Rayonier do not have equal bargaining power. If they are discriminated against, could a current employee demand his rights without jeopardy to their job?

3. Because of past discrimination, racial minorities, women and older individuals are more likely to be under represented in the pool of current employees. If the employer can now limit the pool of applicants to be considered, this creates a built in discrimination.

We respectfully submit that this Court should issue its writ to correct this problem and restore the protection of the Age Discrimination in Employment Act to all citizens not just a limited few selected by the employer. This case takes on greater importance because the guidelines in the ADEA cases, the Title VII cases and ADA cases are used interchangably.

The second question deals with what is a Plaintiff required to show to establish a prima facie case of age discrimination. Arnold showed he was 51 years of age and therefore in the protected category, that he was well qualified in that he held virtually the same job for over 20 years with very good evaluation until his termination in a R.I.F. 4 ½ years before, that he suffered adverse action in that Rayonier would not allow him to apply for any of the vacant salaried positions nor consider him for employment and that Rayonier did not permanently fill the position but left it vacant from January, 2001 to the time of hearing. (All present employees were rejected and Arnold was not considered.)

The District Court and the 11th Circuit Court of Appeals held that Rayonier's Motion for Summary Judgment was correctly granted because Arnold could not make out his prima facie case because he could not prove that the position was permanently filled by a younger individual.

The elements for a Plaintiff to show a prima facie case are set in the leading case of McDonnell-Douglas v. Green, 411 U. S. 792, 93 S. Ct. 1817, 36 L.Ed. 668 (1973). Under McDonnell-Douglas v. Green, Supra, this Court has held that a Plaintiff can make out a prima facie case by circumstantial evidence by proof: (1) That he is in the protected category; (2) That he suffered adverse action; (3) That he was qualified for the position sought; and (4) That the position was vacant and candidates of Plaintiff's skills were still being sought.

These were the elements Arnold provided; however, the District Court and the 11th Circuit Court of Appeals held that Arnold failed to make out a prima facie case because he did not prove that Rayonier filled the position with a younger individual. This Court has previously acted to correct the erroneous opinion of the Court of Appeals. In O'Connor v. Consolidated Coin Caterers Corp. 116 S.Ct. 1307, 517 U.S. 308, 134 L.Ed. 2d 433, it was determined that the District Court and the Court of Appeals dismissed Plaintiff's case upon the basis that he could not prove a prima facie case because the individual hired was also in the protected group, that is 40 years of age and the Plaintiff was 52 years of age. This Court had to point out that the ADEA did not require that the Plaintiff be replaced by someone out of the protected group. The statute protects the public from discrimination because of their age and it is not an element required by the statute nor by the guidelines of this Court that the position be filled to make out Plaintiff's prima facie case. See McDonnell-Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d. 668 (1973) and O'Connor v. Consolidated Coin Caters Corporation, 116 S.Ct. 1307, 517 U.S. 308, 134 L.Ed. 2d 433.

Plaintiff clearly made out a prima facie case and the opinion of the District Court and the Court of Appeals are erroneous and depart from the law and the holdings of this Court. This Court should issue its writ of certiorari to the Court of Appeals and again establish the correct criteria to apply.

The third question raises the issue of whether Rayonier's action in segregating and classifying its employees as the sole pool of applicants it will consider "deprive or tend to deprive any individual of employment opportunities". 29 USC §623 (a) (2) (emphasis added). Rayonier admitted that it would not accept Arnold's application nor consider him for employment no matter what his qualifications were because they limited the applicants they would consider for the salaried jobs to the pool of current employees.

Arnold shows that this practice is illegal since it deprived him and all other interested individuals of the opportunity to be considered for employment. This Court should issue its Writ of Certiorari to the 11th Circuit Court of Appeals to correct this Order, which approves this procedure by Rayonier.

CONCLUSION

An employer should not be allowed to limit the pool of applicants it will consider for employment because it deprives the working public of the protection of the Age Discrimination in Employment Act. If racial minorities, women, handicapped individuals or older workers are under represented in a particular company or industry, such a limitation would build in and perpetuate discrimination in all of these areas because the rulings in one area is applied in the others.

The ruling that Arnold could not make out a prima facie case of age discrimination because Rayonier left the position open and did not permanently fill it is incorrect and is a departure from the McDonnell-Douglas v. Green, supra, frame work. (See also Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097, 2109, 147 L.Ed.2d 105 (2000) and O'Connor v. Consolidated Coin Caterers Corporation, 116 S.Ct. 1307, 517 U.S. 308, 134 L.Ed. 2d 433).

The action of Rayonier in segregating and classifying its employees as the sole source they will accept applications from and consider for employment deprives Arnold of the right to seek employment. (See 29 §USC 623 (a) (2).

The Court should again correct and clarify the Age Discrimination in Employment Act by issuing its Writ of Certiorari to the 11th Circuit Court of Appeals

(Any footnotes trail the end of each document.)
NO. 02-14127
NON-ARGUMENT CALENDAR

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CECIL R. ARNOLD,
Plaintiff-Appellant,

v.

RAYONIER, INC., and JOHN DOE, INC.,
Defendants-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

(January 28, 2003)

Before ANDERSON, DUBINA and BLACK, Circuit Judges. PER CURIAM:

Appellant Cecil R. Arnold ("Arnold") appeals the district court's grant of summary judgment, pursuant to Federal Rule of Civil Procedure 56, in favor of defendant Rayonier, Inc. on his discrimination and retaliation claims, filed pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. He argues that: (1) the undisputed evidence established a prima facie case of age discrimination with respect to the machines/finishing shift supervisor position for which he applied ("2001 position"); (2) the evidence established a continuing violation such that he was not required to file a discrimination charge with the Equal Employment Opportunity Commission ("EEOC")

within 180 days after each of the five rejections by Rayonier; (3) Rayonier violated the ADEA by limiting the pool of applicants it would consider for salaried positions to those it already employed; (4) Rayonier's proffered nondiscriminatory reason - that it only considered current employees for vacant salaried positions - was pretextual because it hired nine outside employees for various other vacant salaried positions; and (5) because a relatively short time period passed between the final judgment in his 1998 trial and Rayonier's first refusal to hire him for a salaried position, he presented a prima facie case of retaliation.

A. Arnold's Age Discrimination Claims

We review de novo the district court's grant of summary judgment, applying the same legal standards as the district court and viewing all the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432(11th Cir. 1998). "Summary judgment is appropriate only when 'there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law.'" Id. (quoting Fed. R. Civ. P. 56(c)).

A person who believes that he has been the victim of age discrimination must file a charge with the EEOC within 180 days of the adverse employment decision if he is in a "non-deferral state." See 29 U.S.C. § 626(d)(l); Grayson v. KMart Corp., 79 F.3d 1086, 1100 (11th Cir. 1996). A "deferral state" is a state that has a law banning age discrimination in employment and that has a state entity authorized to grant or deny relief for such discrimination. Grayson, 79 F.3d at 1100 n. 21. Georgia is not a deferral state. See Delgado v. Lockheed Georgia Co., 815 E2d 641, 646 n.8 (11th Cir. 1987).

The 180-day limitations period does not apply to an employment practice that constitutes a continuing violation. See EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1271 (11th Cir. 2002). Discrete, one-time employment events that should have put a claimant on notice that a cause of action had accrued do not constitute a continuing violation. Such discrete acts include an employer's refusal to hire. See Nat'l R. R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 2073, 153 L.Ed.2d 106 (2002); Riccard v. Prudential Ins. Co, 307 F.3d 1277, 1291 (11th Cir. 2002).

Absent direct evidence of an employer's discriminatory motive, a plaintiff can establish unlawful discrimination under the ADEA by establishing a prima facie case of discrimination. The employer must then respond with a legitimate, nondiscriminatory reason for its action. The plaintiff must then establish that the employer's proffered reason was a pretext for unlawful discrimination. Turlington, 135 F.3d at 1432.

"In an ADEA case involving . . . failure to hire, a plaintiff may establish a prima facie case by showing: (1) that he was a member of the protected group of persons between the ages of forty and seventy; (2) that he was subject to adverse employment action; (3) that a substantially younger person filled the position he sought. . ; and (4) that he was qualified to do the job for which he was rejected." Id.

Upon consideration of the record and the parties' briefs, we find no reversible error. With respect to the four positions for which Rayonier rejected Arnold before 2001, Arnold failed to file an EEOC charge within 180 days of each of the denials. Therefore, his claims with respect to those pre-2001 denials were untimely.

With respect to the 2001 position, Arnold failed to raise a genuine issue of material fact as to whether he established a prima facie case of age discrimination because the undisputed evidence showed that Rayonier never permanently filled the 2001 position, and did not continue to seek applications after determining that none of the applicants for the position were qualified. Further, even if Arnold established a prima facie case, Rayonier proffered a legitimate nondiscriminatory reason for not hiring him - namely, that it was only considering current Rayonier employees for the 2001 position - and Arnold failed to present sufficient evidence showing that reason to be a pretext. The undisputed evidence showed that: (1) all the candidates considered for each of the positions for which Arnold applied were Rayonier employees; (2) the HR 4.0 language was part of a standard form used for all vacancy announcements; and (3) the vacancy announcements for each of the positions at issue were all posted at the Mill only. Accordingly, we conclude the district court correctly granted summary judgment on Arnold's discrimination claims.

B. Arnold's Retaliation Claims

We review de nova the district court's grant of summary judgment, applying the same legal standards as the district court and viewing all the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Turlington, 135 F.3d at 1432. To establish a prima facie case of retaliation under the ADEA, a plaintiff must show that: (1) he engaged in statutorily protected expression; (2) he suffered an adverse employment action; and (3) the adverse action was causally related to the protected expression. Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1311 (11th Cir. 2002).

Upon consideration of the record and the parties' briefs, we find no reversible error. Almost 18 months elapsed between Arnold's last "protected activity" (in this case, his appeal of his 1997 discriminatory discharge case to this Court on July 1, 1998), and the first allegedly discriminatory refusal to hire on December 30, 1999. Other than his temporal argument, Arnold pointed to no other evidence showing a causal connection between Rayonier's refusals to hire him and his protected activity.

For the foregoing reasons, we affirm the district court's grant of summary judgment in Rayonier's favor.

AFFIRMED.

Civil Action No. CV201-185

IN THE UNIETD STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CECIL R. ARNOLD,
Plaintiff,

v.

RAYONIER, INC., and JOHN DOE, INC.,
Defendants.

ORDER

Plaintiff, Cecil R. Arnold ("Arnold"), brings suit against Defendant, Rayonier, Inc. ("Rayonier"), for alleged age discrimination in violation of 29 U.S.C. 621, et seq. Currently before the Court is a Motion for Summary Judgment by Defendant. For the following reasons, the Court will GRANT Defendant' s motion.

Plaintiff's claims stem from his repeated denial of employment with Rayonier. On five occasions since 1999, Plaintiff applied and was rejected for various jobs with Rayonier. In January of 2001, he was rejected for the Machine/Finishing Shift Supervisor position. This was the only rejection which fell within 180 days of the E.E.O.C. complaint filed by Plaintiff on July 5, 2001. Consequently, only this denial of employment may be the basis of an ADEA claim.

Plaintiff's ADEA claim regarding his January 2001 denial. of employment must fail as a matter of law. Plaintiff has not established a prima facie case of discrimination. To establish a prima facie case Plaintiff

must show that: 1) he was between the ages of forty and seventy at the time of the adverse action; 2) he was subject to an adverse employment action; 3) at the time of the adverse action, he was qualified for the position; and 4) the position was filled by a person substantially younger. See Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432 (11th Cir. 1998). The affidavit of Thomas S. Norton states that Rayonier never hired anyone for the Machine/ Finishing Shift Supervisor Position for which Plaintiff applied. (Norton Aff. ¶ 19). Consequently, Plaintiff cannot demonstrate that the position was filled by a person substantially younger than himself.

For the foregoing reasons, the Court hereby GRANTS Defendant's Motion for Summary Judgment.
SO ORDERED, this 26th day of June, 2002.

JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

NO. 02-14127-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CECIL R. ARNOLD,
Plaintiff-Appellant,

v.

RAYONIER, INC., and JOHN DOE, INC.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19, ____F.2d____).

Before ANDERSON, DUBINA and BLACK, Circuit Judges. PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT;